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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANTS

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(34,478)

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANTS.

I.

Opinion of the Court Below.

The opinion in the state court is reported in Eliason v. Wilborn, 335 Ill. 352; 167 N. E. 101; also copied in Record, p. 22.

II.

Jurisdiction.

Appellants' statement as to jurisdiction on appeal was heretofore filed in compliance with Rule 12. The subject is further considered on the merits in the Argument.

III.

Statement of the Case.

The case is one in which there is drawn in question the validity of a statute of Illinois on the ground of its being repugnant to the Fourteenth Amendment of the Constitution of the United States. The judgment of the Supreme Court of Illinois, which is the highest court of that state in which a decision in the suit can be had, sustained the validity of the statute. The case is therefore one which was subject to review in this Court on writ of error under Section 237 of the Judicial Code as amended (U. S. Code, Title 28, Sec. 344) under legislation in force when the Act of January 31, 1928, was passed, which substituted appeal for writ of error. (U. S. Code, Title 28, Secs. 861a, 861b.)

Appellants have filed with the clerk of this Court, as appendices to their statement as to jurisdiction on appeal, authenticated copies of appellants' reply brief and petition for rehearing filed below, in order to show with greater certainty that the federal question raised on this appeal was timely presented. (Appendices: Reply Brief, 8, 9; Petition for Rehearing, 7, 8, 9.) We think this sufficiently appears from the opinion itself (R. 22), but in view of the inadvertent reference in that opinion to the *Fifth* Amendment to the federal Constitution (R. 22), we thought best to bring to the attention of this Court, in the manner indi-

cated, the fact that appellants urged below that the statute, as construed and applied to appellants by the state court, is in violation of the *Fourteenth* Amendment to the federal Constitution because it deprives them of their property without due process of law.

THE QUESTION INVOLVED.

The state statute here involved is "An Act concerning land titles," approved and in force May 1, 1897, as amended, commonly known as the "Torrens Act." (Laws 1897, p. 141; Cahill's Ill. Rev. Stats. 1927, Ch. 30; Smith-Hurd Ill. Rev. Stats. 1927, Ch. 30.) The pertinent sections are hereinafter set out.

The federal question presented on this appeal is: Does that statute as construed and applied to appellants in this case by the court below deprive appellants of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution, when it is held that the statute makes a certificate of title, issued by the registrar of titles (a mere ministerial officer) without notice to the owner and based upon a forged deed, conclusive evidence of title against such owner in favor of a purchaser from the grantee in such forged deed?

HOW THE QUESTION ARISES.

Appellants, on July 30, 1926 (R. 1), filed their petition or bill in equity in the Circuit Court of Cook County, Illinois, to cancel two certificates of title to lands owned by them which had been issued by the registrar of titles of said county without notice to appellants, and to set aside the two deeds upon which such certificates were based. The first certificate was based on a forged deed purporting to have been made by appellants to one Jerome C. Napletone,

and the other upon a deed from said Napletone to appellees, the Wilborns, under which deed the Wilborns claim title.

Appellants' petition was filed in accordance with the provisions of Sections 93 and 94 of said Torrens Act and as therein authorized. Those sections expressly authorize the filing of such a petition by any person interested in registered land to obtain a cancellation of any certificate of title, memorial or other entry upon the register improperly issued or made by the registrar of titles. The proceeding authorized is in the nature of a bill to remove and cancel a cloud on title to registered land.

A demurrer was sustained to the petition and it was dismissed at appellants' costs. Judgment was entered accordingly (R. 13), from which appellants appealed to the Supreme Court of Illinois, the highest court of review in that state.

The Supreme Court of Illinois, in an opinion first handed down October 25, 1928, affirmed the judgment of the trial court. (Certified Transcript of R. 38-49.) Thereupon, appellants filed their petition for a rehearing, which was allowed (R. 16), and the case was reconsidered by that court at the June Term, 1929, at which time, June 19, 1929, the court adhered to the conclusions formerly reached by it and (one of the Justices dissenting), readopted and refiled its former opinion written by Mr. Commissioner Partlow (R. 17), and rendered judgment for costs against appellants in favor of appellees. (R. 26.)

The title to appellants' land, as shown by the pleadings (R. 1) was originally registered under said Torrens Act in Edward J. Haley and wife, on August 6, 1921. By *mesne* conveyances, the title afterwards became vested in appellants, to whom a certificate of title was issued by the registrar under said act, September 21, 1923. In May, 1926, Napletone, a stranger to the title, by false representations

as to his purpose in so doing, obtained from appellants their certificate of title and forged appellants' signatures to a deed purporting to be from appellants to himself, which deed, accompanied by said certificate of title, he filed with the registrar and obtained thereon a certificate of title in himself. A few days thereafter, Napletone conveyed the land to appellees, the Wilborns, who bought without actual notice of the forgery. The Wilborns then filed their deed, together with the certificate of title issued to Napletone based on the forged deed, with the registrar and obtained from him, after notice of the forgery (R. 14), a new certificate showing title in themselves, based on the deed from Napletone. It is these two last mentioned certificates and deeds which appellants sought to have canceled and removed as clouds on their title.

QUESTIONS DECIDED BELOW.

Two questions which controlled the decision in the case were presented and argued on the appeal before the Supreme Court of Illinois and each of them was considered and decided by that court:

First. Whether or not the statute, when properly construed, makes a certificate of title issued by the registrar, based on a forged deed and without notice to the owner whose signature is forged, conclusive evidence of title as against the owner in favor of a purchaser without notice.

The court below decided that it did, and so construed and applied the statute.

Second. Whether or not, as so construed, the statute denies due process of law and is repugnant to the Fourteenth Amendment of the federal Constitution.

The court below sustained the validity of the statute, as thus construed, and held that the statute did not deprive

appellants of their property without due process of law, basing its decision on the grounds:

(a) That the Act makes provision for the protection of any person wrongfully deprived of his land by giving him recourse to the "indemnity fund" provided by the Act, or an action against the county to recover his damages (R. 23-24); and

(b) That when one voluntarily submits his land to the operation of the Act, as in the case of an original registrant, or purchases land already under the Act, as in the case of appellants, he thereby consents, pursuant to the condition imposed by Section 46 hereinafter quoted, to be bound by *all* of its terms and provisions and cannot complain that the Act or any part thereof is invalid as violative of any right under the federal Constitution. (R. 22-23.)

Appellants contend that neither of these grounds can be sustained under the decisions of this Court.

The constitutional validity of the statute is the only ground on which rests the judgment of the court below and it is the only ground on which that court based its decision.

The court below made no attempt to uphold the constitutionality of the statute except on the grounds hereinabove noted. Unless one or both of these grounds can be sustained, appellants contend that the statute is clearly invalid because it deprives them of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution.

PERTINENT SECTIONS OF THE STATUTE.

The Illinois Act is substantially in the form adopted in a number of other states, which Act, in the main, is patterned after the Torrens System of land registration in

force in parts of England, Australia, Canada and New Zealand.

The sections of the statute material to the questions here involved are as follows:

Section 40:

"The registered owner of any estate or interest in land brought under this Act shall, except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all others except:

(1) Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land under the lease. The term lease shall include a verbal letting.

(2) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed.

(3) Such right of appeal, writ of error, right to appear and contest the application, and action to make counterclaim as is allowed by this Act."

Section 42:

"Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

Section 46:

"The bringing of land under this act shall imply an agreement which shall run with the land that the same

shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

Section 47:

"A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferee has the title or interest proposed to be transferred and is entitled to make the convey ance and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and folium in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled'."

Section 54:

"A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or lease not exceeding five years where the land is in actual possession of the lessee or his assigns, shall take effect only by way of contract, between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing

upon compliance with the terms of this act. On the completion of such registration, the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

Section 58, (omitting immaterial parts):

"In the event of a duplicate certificate of title being lost, mislaid or destroyed, the owner * * * may make affidavit * * * and the registrar, if satisfied as to the truth of such affidavit and the *bona fide* of the transaction, shall issue to the owner a certified copy of the original certificate * * * and such certified copy shall stand in the place of and have like effect as the missing duplicate certificate."

Note: The statute makes no provision for notice or hearing before the registrar in the matter of the transfer of title and the issuance of a new certificate based on such transfer.

IV.

Specification of Errors.

1. The Supreme Court of the State of Illinois erred in holding that Sections 40, 42 and 46 of the statute of the State of Illinois, entitled, "An Act concerning land titles," approved and in force May 1, 1897, as amended, (Laws 1897, p. 141; Cahill's Ill. Rev. Stats. 1927, Chap. 30), as construed and applied to appellants by that Court in this case were valid and not in contravention of the Constitution of the United States. (R. 30.)

2. The Supreme Court of the State of Illinois erred in holding that the said statute of the State of Illinois, as construed and applied to appellants by said Court in this case, did not deprive appellants of their property without due process of law and did not deny to appellants the equal

protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. (R. 30.)

3. The Supreme Court of the State of Illinois erred in holding that appellants, by voluntarily purchasing lands registered under the said statute of Illinois, waived their right to complain that any of the provisions of said statute operate to deprive them of their property without due process of law or to deny to them the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. (R. 30.)

5. The Supreme Court of the State of Illinois erred in holding that the certificate of title issued by the Registrar of Titles of Cook County, Illinois, to Jerome C. Napletone, based on a forged deed purporting to have been made by appellants to said Napletone, as grantee, and the certificate of title issued by said registrar to Charles Wilborn and Carrie S. Wilborn, appellees, were conclusive evidence of title against appellants and in favor of appellees and in affirming the judgment and decree of the Circuit Court of Cook County, Illinois, and entering judgment for costs against appellants. In so holding and entering judgment, as aforesaid, said Court deprived appellants of their property without due process of law and denied to appellants the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. (R. 31.)

V.

ARGUMENT.

Summary of the Argument.

POINT A. The statute of Illinois as construed and applied in this case by the Supreme Court of that state (which statute as so construed makes a certificate of title issued by the registrar, a mere ministerial officer, without notice to the owner and based on a forged deed, conclusive evidence of title against such owner in favor of a purchaser from the grantee in the forged deed) deprives appellants of their property without due process of law in violation of the Fourteenth Amendment of the federal Constitution.

POINT B. The so-called compensation provision in the statute (Secs. 101, 102) giving recourse to an "indemnity fund" or action for damages against the county by a person sustaining loss through the "omission, mistake or misfeasance of the registrar," is no answer to the constitutional objection, because the state may not lawfully take the property of one person and give it to another, even for a full compensation, except for a *public* use.

POINT C. If the guaranties under the Fourteenth Amendment have been infringed by the operation of the statute as construed by the court below, the registration of title to lands under the Act, or the acquisition of title to lands already registered, do not constitute such waiver or consent as will preclude appellants from asserting the invalidity of the unconstitutional provision of the statute.

POINT D. Cases holding that a person may waive a constitutional right or estop himself from asserting it, distinguished.

POINT E. The statute implies no consent on the part of a transferee of a registered title that a certificate of title based on a forged deed shall be conclusive in favor of a purchaser. That is a question which this Court has the right to determine (if such determination be deemed necessary in this case), and, in determining that question, this Court is not bound by the state court's interpretation or construction of the statute but must decide for itself the true construction of the statute for the purpose of ascertaining whether or not such consent was given.

POINT F. The holding of the court below that appellants, under the provisions of the Act, had waived a constitutional right, does not oust this court of jurisdiction.

POINT G. The only ground on which rests the decision below is the constitutional validity of the statute.

POINT A.

THE STATUTE AS CONSTRUED AND APPLIED IN THIS CASE BY THE SUPREME COURT OF ILLINOIS DEPRIVES APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

The statute (Secs. 40, 42, *ante* p. 7), as construed and applied by the court below, makes a certificate of title issued by the registrar (a mere ministerial officer) without notice to the owner and based on a forged deed, conclusive evidence of title against such owner in favor of a purchaser from the grantee in the forged deed. We do not believe, in view of the provisions of Sections 47 and 54 of the Act (*ante* p. 8) that the statute intended such result, but the court below so construed it. That court, however, made no attempt to uphold the constitutionality of the statute as so construed, except upon the grounds that the statute gives to the defrauded owner recourse to the "indemnity fund" or action against the county to recover his damages, and that when an owner voluntarily registers his title to lands, or when one buys lands already registered, he consents to be bound by every provision of the statute and thus waives his constitutional rights guaranteed by the Fourteenth Amendment. These grounds are next considered under Points B and C.

So far as we can learn, this is the first instance under our form of constitutional government that any court has ever held that a person, through no fault or wrong of his own, may by force of a statute have his property wrested from him and given to another by means of a forged deed. No doubt this may be done in foreign states which are uncontrolled by constitutional limitations such as are embodied in our Fourteenth Amendment; but, even in England, if we accept the statement of Niblack in his "Analysis of the Tor-

rens System," Sec. 135, p. 213, the English land owners "cried out vehemently against a statute [Act of 1875] which gave effect to a title founded on a forgery" and refused to put their lands under the Act. He says that the people "were more concerned about holding the lands they had than about an improved system under which they might take title to other lands," and that as a result of this protest and failure of the system, Parliament, in framing the Act of 1897, declared a registration founded on a forgery to be absolutely void for all purposes and gave to the person suffering loss by such void registration compensation from the indemnity fund.

The Torrens Acts of Massachusetts and Ohio likewise expressly provide that a registration of transfer of title "procured by the presentation of a forged duplicate certificate, or of a forged deed or other instrument, shall be null and void." (Genl. Laws, Mass., 1921, V. 2, Chap. 185, Sec. 62; Throckmorton's Ann. Code, Ohio, 1929, Sec. 8572-41.) In North Carolina and Tennessee the statute expressly excepts from the conclusiveness of a certificate of title cases where "registration has been procured through forgery." (N. C. Code, 1927, Sec. 2393; Hemingway's Ann. Code, Tenn., 1927, V. 2, Sec. 6154.)

It may also be of interest to quote from the same author his observations on the federal question under consideration. He says, (p. 213):

> "We have discussed the effect of the forgery of instruments respecting registered land as if the conditions of the law were the same in this and in foreign countries. In foreign countries the legislative power may declare that the production of the last duplicate certificate of title shall be conclusive authority to a registrar to make a new registration, and may declare also that a new registration on a transfer from the last registered owner shall be valid and shall be conclusive evidence of title. When it declares that a regis-

tration void for forgery shall become the root of a new title, in favor of a bona fide transferee for value from the owner whose certificate was issued as the result of the forgery, there is the end of it. But in this country there are constitutional limitations on the power of the legislatures to pass laws, and no law of a state may deprive any person of property without due process of law. * * * It may be that Section 38 of the California Act is constitutional and valid, but for the determination of this matter, and of many questions arising under Torrens statutes, we must wait until the Supreme Court of the United States has rendered its decision."

The California statute above referred to expressly makes a certificate of title conclusive though founded on a forged deed. This, we believe, is the only state in which the act in terms so provides. The constitutionality of that provision has not, we are informed, ever been passed upon by the California courts. The Supreme Court of that state did hold, however, in Follette v. Pac. L. & P. Corp., 189 Calif. 193, that the Torrens Act, if construed to make a certificate of title conclusive in favor of a purchaser against the holder of an unregistered easement who was not made a party to the original registration proceedings, violated the due process clause of the federal Constitution.

The Act under consideration provides for neither notice nor hearing in the matter of transfer of title to registered land and the issuance by the registrar of a new certificate of title based on such transfer. No opportunity is afforded the registered owner to protect his property, or even to be heard, in case of the wrongful or unauthorized action of the registrar in making such transfer and issuing a new certificate.

Section 47 (*ante* p. 8) prescribes the two essential conditions and prerequisites to authorize the registrar to make the transfer, viz.; the filing of the registered owner's deed

(i. e. *his* deed, *not* a forged instrument), and the surrender to the registrar of the owner's duplicate certificate of title.

Yet, notwithstanding the provisions of Section 47, if the registrar, acting negligently, arbitrarily or fraudulently and without authority of law and contrary to the provision of the statute, registers a transfer of the owner's title and issues a certificate of such transfer, based on a forged deed, or upon no deed at all, and with or without the production of the owner's duplicate certificate of title, such certificate of transfer is by this statute, as construed by the court below, made conclusive evidence of title against the owner in favor of a subsequent purchaser without notice. The effect of this holding is to take the property of the rightful owner and give it to another without notice to the former, without opportunity to defend his rights and without his day in court.

The effect of such a statute, we submit, is the taking of property without due process of law contrary to the Fourteenth Amendment.

No greater effect can be given to the forged deed, upon which the registrar acted in the instant case, than to a blank piece of paper. A forged deed is a nullity. No rights can be claimed under it. It is not even entitled to be received for record under general recording statutes, and if recorded affords no protection to one purchasing in reliance upon such record. (Pry v. Pry, 109 Ill. 466, 476; Marden v. Dorthy, 160 N. Y. 39, 54 N. E. 726, 731; 5 Thompson on Real Property, Sec. 4025, p. 13.)

If a certificate of title based on a forged deed—an utter nullity— is to be made conclusive in favor of a purchaser under Sections 40 and 42 of this statute, then it follows that any certificate issued by the registrar under *any* circumstances, without the presentation to him of *any* deed, duplicate certificate of title, or other document of *any* kind

or nature, is likewise conclusive. Such a construction of the statute makes the registrar the most powerful autocrat known to modern times. He may sit at his desk and, governed only by his whims and caprices, transfer registered titles to whomsoever his fancy may dictate. If the construction placed upon the Torrens Act by the court below is upheld, then purchasers from such transferees will hold the titles absolutely secure from successful attack and the true owners will have lost their lands without notice and without fault on their part. Such a result, we submit, is contrary to every established principle of private rights and distributive justice, and is violative of due process of law guaranteed by the Fourteenth Amendment.

It is, indeed, shocking to every sense of justice and to every conception of private rights that a man's property may by such means be taken from him—even his home which to him and his family may have a value, due to sentiment or associations, not to be measured in dollars and cents—without any notice or opportunity to be heard.

This Court, in Scott v. McNeal, 154 U. S. 34, 45, quoting from United States v. Cruikshank, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in Bank v. Okely, 4 Wheat. 235, 244, said that the Fourteenth Amendment was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." This statement is quoted by Judge Cooley in his work on Constitutional Limitations (8th ed. V. 2, p. 739) where he collects numerous decisions of this and other courts announcing the same rule. As said by Mr. Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capri-

ciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Hurtado v California, 110 U. S. 516, 535."

In Missouri Pacific Ry. v. Nebraska, 164 U. S. 403, 417, this court, citing cases, said:

> "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

It is well settled that legislation may, within certain limitations, declare that proof of one fact, or group of facts, shall constitute *prima facie* evidence of the main or ultimate fact in issue without violating the due process clause of the Fourteenth Amendment, but it may not be made *conclusive* of the rights of the person against whom it is raised. It was so decided in two recent opinions of this court delivered by Mr. Justice Butler, in Western & A. R. Co. v. Henderson, 279 U. S. 639, and Manley v. Georgia, 279 U. S. 1.

The case first cited involved the validity of a state statute declaring that a railroad company shall be liable for damages to person or property by the running of its trains, "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company", which was construed by the state court as permitting the presumption of negligence thereby created to be given the effect of evidence, to be weighed against opposing testimony and to prevail unless such testimony is found by the jury to preponderate. This court held that the statute, as so construed, was violative of the due process

clause of the Fourteenth Amendment, and at page 642 said:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. Manley v. Georgia, ante, p. 1, and cases cited."

In Manley v. Georgia, supra, at page 6, this court said:

> "If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Bailey v. Alabama, 219 U. S. 219, 233, et seq. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

The analogy between the cases last cited and the case at bar is apparent. In the instant case the statute making the registrar's certificate conclusive evidence of title in the Wilborns is even more far-reaching in denying to appellants their constitutional rights and in depriving them of their property without due process of law than were the statutes which this Court found violative of the Fourteenth

Amendment in the two cases last cited—for appellants are afforded absolutely *no* opportunity to defend their property rights by *any* showing, no matter how overwhelming, in *any* form of judicial proceeding. As the record discloses, when they sought to save their rights in the proceeding below, and showed by their petition that they had never parted with their title and that the certificate of the registrar did not truthfully set forth the state of title, they were met at the threshold by the proposition that the door of inquiry was closed by the statute. In other words, the court below held that the statute requires that appellants must lose their property by reason of the unauthorized act of a mere ministerial officer who was misinformed or deceived as to the facts, and that appellants must be denied a day in court in which to establish that they had never conveyed their title to anyone and thus repel any presumption based on the registrar's certificate that there had been a lawful transfer of title—all because that certificate was by the statute made *conclusive* evidence against them.

The practical effect of making the certificate conclusive evidence of title is to oust the courts of jurisdiction to hear and determine a justiciable controversy or even to inquire into the facts upon which the rights of the disputants are founded, thus operating to deprive an owner of his property without due process of law. The action of a mere ministerial officer is thus substituted for the determination of a duly constituted court, reached after notice and full opportunity to the opposing parties to be heard and to have their rights adjudicated in accordance with established rules and principles of law. No matter how arbitrary or contrary to those principles and to natural justice the action of the registrar may be, under this statute the courts are powerless to remedy the wrong.

The statute affords an owner no safeguard against the unlawful taking of his property.

We quote from the opinion below (R. 23):

> "After the title was registered in appellants it could not be registered in Napletone until the duplicate certificate to appellants was surrendered to the registrar. If section 47 had been complied with it would have been impossible for Napletone to have accomplished this fraud. The act erected a safeguard against a forged transfer being registered, by the requirement that no transfer should be registered unless the owners' certificate was produced along with the instrument of transfer."

This statement in the main is *incorrect*. The statute affords the owner no safeguard if, as construed by the court below, it makes the registrar's certificate of transfer conclusive and bars all further inquiry.

If, as held in this case, the fact that an owner has made no conveyance of his property affords him no safeguard, how, then, could his retention of his duplicate certificate do so? Under the statute (Sec. 47, *ante*, p. 8) the two requirements prescribed to authorize the registrar to make a transfer and issue a new certificate thereon are (1) the filing of the owner's deed, and (2) the surrender to the registrar of the owner's duplicate certificate of title. It is therefore idle to say that either requirement constitutes a safeguard if the failure to do either or both is no protection in law against the unauthorized act of the registrar in issuing a certificate of transfer without compliance with such requirements, and if such certificate, when issued to a purchaser without notice, is made conclusive. The owner's failure to make a deed or to retain custody of his certificate would, in fact and in law, constitute a safeguard and make it impossible to accomplish a fraud, *only* if the statute were construed to render a certificate void upon it being shown

that it was issued without such deed and surrender of the owner's certificate of title, as is the case in Massachusetts and in the other states above mentioned where the statute makes such a transfer void. In other words, the statute would furnish a safeguard only in case the conclusiveness of the registrar's certificate was made dependent upon his *authorized* action under Section 47 in the two respects above named.

It is possible, of course, that if Napletone had not obtained from appellants their certificate of title he might not have succeeded in accomplishing this fraud; but that does not follow from any provision of or safeguard afforded by the act. If, under this Act as construed by the court below, the registrar issues a certificate to a grantee under a forged deed, or without any deed, and without the surrender of the owner's outstanding duplicate certificate, or without any affidavit as to its loss, a purchaser from such grantee nevertheless gets good title, and this, in spite of the fact that the owner may have his duplicate certificate under lock and key.

We have also noted above (p. 9) Section 58 of the statute, which provides for the issuance of a certified copy of the certificate upon filing of affidavit of loss, etc., of the owner's duplicate original. Under this section, despite the utmost care and the actual possession of his certificate by the rightful owner, one intending to steal his land may forge an affidavit of loss, present it to the registrar and obtain a certified copy of the duplicate certificate, which copy, under the statute, has "like effect as the missing duplicate certificate." He may then forge a deed from the owner, present it with the new certificate, have the transfer registered and, upon conveying to a purchaser ignorant of these facts, take the owner's property from him without notice and without his act, fault or knowledge. He may

also accomplish the same result by forging an owner's duplicate certificate as well as the deed, or by fraudulently inducing the registrar to issue a new certificate without the production of *either* the outstanding certificate or affidavit as to its loss.

The court below was correct in saying, as quoted above, that "if section 47 had been complied with it would have been impossible for Napletone to have accomplished this fraud," but the court overlooked the fact that in order to have complied with section 47, it was necessary not only to file with the registrar the owner's duplicate certificate of title, but also *his* deed—not a *forged* one—as required by said section.

A certificate of title cannot always be conclusive.

Appellees may urge that it is highly desirable to establish a system of evidencing land titles which will absolutely protect a purchaser in expending his money at the time he acquires title; but we submit it is much more desirable that such system shall protect an owner in the possession and enjoyment of his property *after it has been acquired*. But, however much the advocates of such a system may desire to establish a method for the registration of title to lands whereby the title to any particular parcel will always be ascertainable by reference to a certificate issued by a state official, made by law conclusive, such desire must always be circumscribed by constitutional limitations intended to protect rights of paramount importance.

The preservation of constitutional guaranties is more important than any particular scheme or system of evidencing title to lands.

The Fourteenth Amendment was added to the Constitu-

tion to protect, among other rights, the possession and enjoyment of property after it has been acquired, and any system which defeats this object is neither desirable nor possible under our system of government.

Even if a system based upon the conclusiveness of the registrar's certificate under all circumstances were constitutionally possible, experience, in one country at least, has demonstrated its undesirability as shown by its history in England, where, after a trial, it was found necessary to amend the Torrens Act in 1897, so as to make a registration founded on a forgery absolutely void for all purposes. (*ante* p. 14.) And in our own country, four of the States which have enacted a Torrens statute have inserted therein a like provision. (*ante* p. 14.)

In re Bickel, 301 Ill. 484, at page 491, the court set forth various statements of the objects hoped to be attained by the Torrens System, and continued:

> "These general statements are the ideal which it was hoped the system would reach, but the practical question presented is how near the ideal may be approached in view of other established rules of property. The certificate of title is not always entirely conclusive. (In re Peters, 119 Minn. 96, 137 N. W. 390; Annotation, the Torrens Law, L. R. A. (1916D) 14 et seq.)."

If this court should hold with appellants in this case it is apparent from decided cases that it will not be the first to introduce an exception to the conclusiveness of a registrar's certificate or an element of doubt into the system. Already such certificates of title must be accepted with many qualifications and exceptions.

For example, in Hooper v. Haas, 332 Ill. 561, it was held that such a certificate was not conclusive in favor of a purchaser at an execution sale as against one claiming under an unregistered plat dedication. In Chicago & Riverdale

L. Co. v. Vellenga, 305 Ill. 415, it was held that such certificate was not conclusive as against an unregistered claim of mechanic's lien. The same conclusion was reached in Hacken v. Isenberg, 288 Ill. 589. In Follette v. Pac. L. & P. Corp., 189 Calif. 193, it was held that such certificate was not conclusive in favor of a purchaser as against the holder of an unregistered easement who was not made a party to the registration proceeding, and the court said further, that under those circumstances the provisions of the California Act making such certificate conclusive, violated the due process clause of the federal Constitution.

By the great weight of authority it is held that state *lis pendens* statutes do not apply to actions in federal courts. (Wilson v. Hefflin, 81 Ind. 35, 44; King v. Davis, 137 Fed. 222; Stewart v. Wheeling and L. E. R. R. Co., 53 Oh. St. 151, and cases there cited.) We submit therefore that even where no *lis pendens* notice has been filed with the registrar, no certificate of title can be conclusive in favor of a purchaser, as against rights arising under bankruptcy proceedings, Volstead Act proceedings or other proceedings, either in equity or at law, pending in the federal courts.

The foregoing illustrations demonstrate that under our present laws and federal Constitution, a certificate of title issued by a non-judicial officer, without giving parties adversely affected an opportunity to be heard, cannot be made conclusive under all circumstances in favor of a purchaser.

From all of the foregoing considerations, we submit that the Torrens Act of Illinois, as construed and applied to appellants in this case by the Supreme Court of that State, deprives appellants of their property without due process of law in violation of the provisions of the Fourteenth Amendment of the federal Constitution.

POINT B.

THE PROVISION OF THE STATUTE REMITTING APPELLANTS TO THE "INDEMNITY FUND" OR ACTION AGAINST THE COUNTY DOES NOT CURE THE CONSTITUTIONAL OBJECTION.

The so-called compensation provision in the statute (secs. 101, 102) giving recourse to an "indemnity fund" or action for damages against the county by a person sustaining loss through the "omission, mistake or misfeasance of the registrar," is no answer to the constitutional objection because property may not be lawfully taken from one person and given to another, even for a full compensation, except for a *public* use.

The opinion below, after referring to this provision of the statute, says (R. 24):

> "In Board of Education v. Blodgett, 155 Ill. 441, it was held that the deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away."

The opinion makes no further comment upon or reference to this provision or its effect on the question of the validity of the statute. The court, seemingly, was of the opinion that a citizen may not complain that his property is taken from him without due process of law, provided the statute which authorizes such deprivation affords him a remedy by way of an action to recover the *value* of his property. The court failed to differentiate between the substitution of one remedy for another remedy and the substitution of a remedy in damages for *property* taken without due process.

The Fourteenth Amendment was intended to protect every person in the ownership of property *in specie*. The Amendment does not provide that no person shall be de-

prived of his property without due process unless provision is made for giving to the owner an equivalent for the property wrongfully taken. Much property has a value to its owner far in excess of its actual market value. A home which has been enjoyed for more than a generation, a place of business in which the owner has conducted a successful enterprise for many years, have a value to their owners which is not to be measured by the ordinary rules for determining values in courts of justice. The Fourteenth Amendment would become a mockery, indeed, if a statute were held to be in consonance therewith which provided that a stranger may take for his private use such home or such place of business *without notice and without the consent of the owner,* provided only such statute shall contain some provision for giving to the wronged owner the market value of the property as and when such value may thereafter be determined in an action instituted by such owner.

However great may be the benefit, real or imaginary, to the people which a new statute may be hoped to secure, such statute cannot stand if it violates the provisions of the fundamental law. (In re Bickel, 301 Ill. 484, 491.) It was the very purpose of the Constitution to secure to all citizens certain fundamental rights which may not be invaded by law-making bodies whatever their motives or ideals. If the interests of all the people will in fact be benefited by a change in laws which cannot be made because of constitutional limitations, then such change can be accomplished only by amending the Constitution. Experience has taught us the wisdom of this safeguard.

A practically identical provision relating to compensation in the Ohio Torrens Act was before the Supreme Court of that State in the case of State v. Guilbert, 56 O. St. 575, wherein at p. 623-4, and with reference to this precise question, it was said:

"The terms of these sections of the act show that the fund is to be raised to indemnify those whose lands have been wrongfully wrested from them, under the earlier provisions of the act, and without due process of law. When the provisions of the constitution are applied to this penitential scheme, it at once becomes apparent that it is both inadequate and forbidden. * * *

"But property in all of its subjects is equally sacred under the protection of this section of the bill of rights. To permit its abrogation would equally expose all descriptions of property to spoliation. The section is an inviolable assurance to all owners of lands and chattels that, unless they are required for a public use, they may retain them in specie, placing upon them any estimate that may be suggested by judgment, sentiment or caprice; and it is not within the combined authority of the departments of the government of the state to say that the estimate is too high. * * *"

While the court below did not hold or even intimate that the statute could be sustained under the provisions of the Constitution of Illinois as an exercise of the power of eminent domain, nevertheless, we wish to comment briefly on that subject.

Although the result of making the certificate conclusive is to deprive appellants of their property, it cannot, we think, be considered as an exercise by a state of the power of eminent domain, any more than a statute which attempts to make a presumption conclusive. The effect in either case is not the physical "taking" of property by the state in any constitutional sense, but is merely to deny to a party the right to assert or establish his rights or ownership of property in a judicial proceeding brought by him for that purpose. The statute operates merely as an estoppel against the assertion of ownership—not the *taking* of property under the power of eminent domain.

It is merely the substitution of a claim or right of action

for damages for the property which has been taken from the owner by another, wrongfully and without due process of law. Expressed otherwise, it is compensation for the *theft* of one's property—not the taking or appropriation of that property for a public use.

Moreover, the question whether this statute as construed below can be sustained as an exercise of the power of eminent domain is not in the case, because:

(1) Under the Constitution of Illinois (Sec. 13, Art. 2) as construed by the Supreme Court of that State (People v. Smart, 333 Ill. 135, 137; Moore v. Drainage District, 266 Ill. 399), a citizen cannot be deprived of his property under the power of eminent domain until compensation for his property has not only been *fixed* but *first paid* to him.

(2) There is nothing in the opinion below indicating any intention of the State Supreme Court to overrule its former decisions above cited, or to hold that the taking of appellants' property could be justified, upon independent grounds, as an exercise of the power of eminent domain under the Constitution of Illinois. That court did not attempt to sustain the validity of the statute in question upon any such ground. The grounds of the decision are that appellants are precluded from questioning the constitutionality of the statute because of their supposed consent or waiver; and that, inasmuch as the statute gave them a *remedy* by way of action against the county, this remedy was a lawful substitution for their right of property which had been taken away, and therefore they could not complain of being deprived of their property without due process of law. (Opinion R. 24.)

(3) The law in Illinois being as above stated, it necessarily follows that the judgment below cannot be sustained on this appeal on the ground that the "taking" of appellants' property was a legitimate exercise of the power of

eminent domain, even though this Court should, without reference to the Constitution and laws of Illinois, hold that such a "taking" is, in general, the exercise of the power of eminent domain. To do so, would be to sustain the judgment below on a ground opposed to the Constitution and law of Illinois, which prohibit the taking of private property for a public use until compensation has first been fixed and paid. And, since the statute in question makes no provision for the fixing or payment of compensation in advance of the "taking," it cannot, in view of the grounds on which the court below based its decision, be sustained by this Court as a proper exercise under the Constitution and laws of Illinois of the power of eminent domain.

But, even considered as an assumed exercise of the power of eminent domain, inasmuch as the taking of appellants' property from them by means of the unauthorized registration and vesting it in appellees is for the latter's private use, the provision for compensation in no way legalizes the taking.

Private property cannot be said to be taken for a public use where there is no change in the use resulting from the taking—the use remaining private as before. The use to which appellants' property is now devoted is no different in kind or character, nor less private, than it was before. The transfer from appellants to appellees merely resulted in a change of private ownership—not a change in use.

The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. (Cole v. LaGrange, 113 U. S. 1.)

Judge Cooley, in his work on Constitutional Limitations (8th ed., V. 2, p. 1124) says that it is conceded on all hands (citing copious authorities), that a state cannot take the

property of one citizen and pass it over to another, *even for a full compensation*, except for a public use.

In Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 158, this Court held that, while there is no specific provision in the federal Constitution which acts upon the states in regard to their taking private property for any but a public use, under the Fourteenth Amendment a citizen is deprived of his property without due process of law, "if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain."

A case involving somewhat the same question was very recently decided by the Circuit Court of Appeals, Eighth Circuit, in Jones v. York County, Nebraska, 26 Fed. (2d) 623, 628. It was there held, as it was held in the *Ohio case* above cited, that losses to individuals sustained through omissions, mistakes or misfeasance of the registrar, could be paid only out of the "indemnity fund," and could not be collected from the people by means of a general tax levy, for the reason that such a tax would not be for a *public* use but solely for the private benefit of individuals who had sustained losses. After pointing out that the Torrens Act of Nebraska was neither mandatory nor all-embracing, and did not undertake to supplant the registry laws existing in that state, but was optional, etc., the court said:

> "The operation of the act is, therefore, not general, and a tax levy to reimburse those who have suffered loss thereby would fall upon any who have not assumed liability for such potential losses. The legislative action falls short of an exercise of the police power for the common welfare of all the people."

The court in its opinion quotes from the authorities, including Citizens' Savings & L. Assn. v. Topeka, 20 Wall. 655, to show that the power of taxation is limited to objects in their essential character public and not private, and

(quoting from the case last cited) "cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby."

The Illinois Act, like that of Nebraska, is not general throughout the state. It has been adopted only in Cook County. It is optional—not compulsory—and does not supplant the existing registry laws. (R. 22.) In fact but a relatively small portion, in value, of the lands in that county are registered under the Torrens Act.

But, even if the Act were both general and compulsory, applicable to all lands throughout the state or throughout any territorial division of the state, and assuming that the power of eminent domain extends to the mere taking of property implied from a change of ownership without regard to the character of any change in the use resulting from such taking, it would still require some stretch of imagination to discover a public use or purpose in a statute which protects a purchaser in acquiring a title based on a forged deed and then, when he has acquired it, suffers him to lose it by the same means. It comes pretty close to putting a premium on forgery.

It adds not one iota to the security or stability of titles, for a title so acquired is just as vulnerable in the new owner, in this respect, as it was in the former owner. In fact, under the Torrens Act as construed by the court below, the stability and security of titles is impaired by taking away the immunity from loss through forgery. Under it, a man may never truthfully say that he is still the owner of his home or other property, without first consulting the records in the registrar's office.

Clearly, a statute which sanctions the loss of title through forgery can serve no public purpose at all. It merely determines a conflict of private interests between the pur-

chaser who buys without notice of the forgery and the former owner whose deed is forged, by shifting the loss from the one to the other. It adds nothing to the stability of the title but creates an infirmity by making it a subject of larceny. No public purpose is subserved by a law which protects a *purchaser,* who has the opportunity before he buys of protecting himself, and affords no security of title whatsoever to that same purchaser when he becomes the *owner.*

The assurance to a purchaser of protection against a prior forgery is of doubtful value to him if the price he pays for such protection takes from him the assurance that he may keep his property after he buys it. Having become the owner, his own security and protection is no greater than those possessed by the former owner. In fact, it may be less because his loss through a subsequent forgery would involve, not only the land, but all improvements made by him on the land.

The provision for compensation may protect the purchaser who relies on the certificate of title, but who, by reason of the forgery, fails to get title. In his case no constitutional rights are impaired and he has no cause to complain if he recovers his damages caused by the error or wrongful act of the registrar. But not so with the owner whose property is arbitrarily taken from him without due process of law and given to another. Compensation by way of damages is no justification in his case. He has a constitutional right to retain his property in specie and it cannot be taken from him, "even for full compensation, except for a public use," and not even then, under the Constitution of Illinois, as above shown, unless compensation is fixed and paid before the taking.

POINT C.

IF THE GUARANTIES UNDER THE FOURTEENTH AMENDMENT HAVE BEEN INFRINGED BY THE OPERATION OF THE STATUTE AS CONSTRUED BY THE COURT BELOW, THE REGISTRATION OF TITLE TO LANDS UNDER THE ACT, OR THE ACQUISITION OF TITLE TO LANDS ALREADY REGISTERED, DO NOT CONSTITUTE SUCH WAIVER OR CONSENT AS WILL PRECLUDE APPELLANTS FROM ASSERTING THE INVALIDITY OF THE UNCONSTITUTIONAL PROVISION OF THE STATUTE.

Section 46 of the statute (*ante* p. 7) provides that "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof."

The court below held that appellants were precluded from questioning the validity of any part of the statute because they had consented to be bound by *all* of its terms and provisions under the conditions imposed by said section, and such consent was held to be implied from their having purchased lands registered under the Act.

There is thus squarely raised the question of the right of a state indirectly to impair constitutional guaranties by compelling a person to elect either not to exercise a right or privilege at all (in this case, the right or privilege to purchase and own registered lands) or, as the price to be paid for exercising such right or privilege, to waive the protection of the Fourteenth Amendment and consent to be bound by a statute which deprives him of his property without due process or denies to him the equal protection of the laws. The holding of the court below on this point is contrary to the principle announced by this Court in the cases hereinafter cited.

The law as laid down in these cases is that no validity or effect can be given to any consent or agreement of a person to surrender a right or privilege secured to him by the Constitution or laws of the United States, made or implied in obedience to a statute which requires such consent or agreement as a condition to the exercise of a right or privilege granted by such statute.

In the cases next cited below, this Court held that, while a state may prohibit a foreign corporation from transacting any local business within the state and may impose such conditions as it sees fit in granting such privilege, yet it may not, as a condition precedent to obtaining a permit to do a local business, require the corporation to surrender a right or privilege secured to it by the Constitution or laws of the United States—specifically, the right to remove a cause from a state to a Federal Court. In these cases it was held that no validity or effect could be given to such a statute nor *"to any agreement or action of the corporation in obedience to its provisions,"* and that the action of the corporation in entering the state and availing itself of the privileges granted by the statute—even to the extent of agreeing in writing to be bound thereby—did not preclude the corporation from asserting the invalidity of the unconstitutional provision of the statute.

Barrow Steamship Co. v. Kane, 170 U. S. 100, 110-1.

Southern Pacific Co. v. Denton, 146 U. S. 202, 207.

Barron v. Burnside, 121 U. S. 186, 200.

Insurance Company v. Morse, 87 U. S. 445, 451.

The recent case of *Power Co.* v. *Saunders*, 274 U. S. 490, 496, involved the constitutionality of a state statute which discriminated, in respect to the venue of actions, between domestic and foreign corporations. Counsel for the plaintiff in that case advanced the ground that the defendant

corporation "impliedly assented to the venue provisions by seeking and obtaining permission to do business within the State, the provisions being then on the statute book." This Court, answering that argument, said:

> "The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States. The principal cases are cited and reviewed in *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, 507, *et seq.*, and *Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583, 594, *et seq.* To them may be added the case of *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 468, where it was held that 'the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States.'"

The Minnesota statute involved in the *Cargill* case, cited *supra*, contained a provision (in substance the same as Section 46 of the Illinois Torrens Act) that "every person, company or corporation receiving such license *shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same.*" The case last cited would seem to be conclusive on this point.

In Western Union Telegraph Company v. Kansas, 216 U. S. 1, 35-36 and Pullman Company v. Kansas, 216 U. S. 56, 63, this Court applied the same principle to a statute which required a corporation of another state, as a condition of doing a local business in Kansas, to pay to the state certain graduated percentages of its capital stock. It was held that this requirement imposed a tax on property beyond the limits of the state, in violation of the due process

clause; that, thus, it was violative of the constitutional rights of the company, and that the right of the company to continue to do business in Kansas was not and could not be affected by this condition to which the corporation could not be compelled to consent.

The principle laid down in these cases was restated and reaffirmed in International Paper Co. v. Mass., 246 U. S. 135, 141, where numerous prior decisions were reviewed.

The same rule was applied in Hanover Ins. Co. v. Harding, 272 U. S. 494, 507, in which this Court held that a state may require, as a condition precedent to a renewal of a license of a foreign insurance company to do business in Illinois, that all valid laws of the state shall have been complied with, but that the state may not make compliance with a statute requiring payment of a tax past due and which is violative of the federal Constitution a condition precedent to the renewal of such license.

These cases involved the precise point under discussion. In most of them the judgment of the state court was based upon the proposition that the party assailing the constitutionallity of the statute was barred from doing so either by its express agreement made in obedience to such statute or by having availed itself of some of the provisions of the statute from which the state court implied a waiver of or consent to the relinquishment of a constitutional right. This Court, as above shown, expressly refused to adopt such a doctrine and reversed the courts below.

In the instant case the court below based its decision on the same proposition, holding that appellants were precluded from questioning the constitutional validity of any section of the statute, whether violative of the federal Constitution or not, because of their supposed "consent" implied from their purchase of lands which had been registered under the Act, and which consent to be bound by all

the terms of the statute was, by Sec. 46 thereof, attempted to be imposed as an agreement running with the land.

The court below stressed the idea that whatever might be the hardship of which appellants complain, it was one which they had voluntarily assumed, saying (Rec., 23): "They were under no obligations to buy, but when they did buy and registered their title they came under all of the provisions of the act and were presumed to know all of its terms."

This Court decisively disposed of such an argument in Frost Trucking Company v. R. R. Commission, 271 U. S. 583, 593, wherein the cases hereinabove referred to and many others are reviewed. Speaking through Mr. Justice Sutherland, this Court said:

> "Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden. * * * It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that *it may not impose conditions which require the relinquishment of constitutional rights.* If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." (Italics ours.)

The above case involved a statute of California requiring *private* carriers using the state highways to procure a certificate of public convenience and necessity and to

assume the duties and burdens of a *common* carrier. This Court held the statute invalid on the ground that, even assuming that the use of its highways by private carriers for hire is a privilege which the state may deny, it cannot constitutionally exact as the price for the exercise of that privilege the unconstitutional condition that a private carrier shall assume against his will the burdens and duties of a common carrier. This Court answered the contention urged in that case that the act of the carrier was a voluntary one and that he was not compelled against his will to assume the burdens of a common carrier, by the language above quoted.

It is appropriate at this point to note the far reaching operation and effect of section 46 of the statute if it is to be given effect as held by the court below. This section not only provides that the bringing of land under the Act shall imply an agreement running with the land that the same shall be subject to all the terms of the Act as it stood at the time of its passage, but also shall be subject to "all *amendments* and *alterations* thereof." So that, whenever and however the Act may be hereafter amended, regardless of the extent to which such amendment may deny equal protection of the laws or other constitutional guaranties, the owner of registered property is without remedy and must be held to have consented in advance to all such unconstitutional amendments. Indeed, the extent to which the State may go in such case is without limit if this doctrine of consent or waiver is to be given effect. For example, if this Act should at any time hereafter be amended so as to provide a different rule or principle of taxation of registered lands from that which is applied to non-registered lands; or should the Act be amended so as to provide that no suit or action affecting registered lands should be brought in any court, but that all con-

troversies arising in relation thereto and all proceedings brought for condemning such land for public use, should be conclusively determined, with or without notice to the owner, by some ministerial state officer or other person designated, the owner would, under the theory of waiver and consent advanced in this case, be without remedy, and rights secured to him by the Fourteenth Amendment would avail him nothing.

There is still another aspect to this question, which in the instant case is of even greater importance than the one above considered. It is this: The appellants were not the original registrants. Their only act from which any consent or waiver can be inferred was in purchasing property already registered under the Torrens Act. Such acquisition is more than a mere privilege granted by the State; it is a right or privilege guaranteed by the Fourteenth Amendment to the federal Constitution. The State is therefore without power to condition the exercise of that constitutional privilege by appellants upon their consent to waive the other constitutional privilege likewise granted them by the Fourteenth Amendment, namely, that their property, when so acquired, shall not be taken from them without due process of law.

Privileges and immunities, as used in the Fourteenth Amendment, include "the right to acquire and possess property of every kind." This definition of Mr. Justice Washington was quoted with approval in Maxwell v. Dow, 176 U. S. 581, 589. It was again adopted in substance in Paul v. Virginia, 8 Wall. 168, 180, and in Ward v. Maryland, 12 Wall. 418, 430. Judge Cooley, in his work on Constitutional Limitations, (8th ed. V. 2, p. 821) says that the privileges and immunities guaranteed by the Fourteenth Amendment include "the right by the usual modes

to acquire and hold property and to protect and defend the same in the law."

This right to acquire property, like other rights, is subject, of course, to lawful regulation by the State, but may it be indirectly impaired under the guise of consent or waiver by compelling a person to elect either not to exercise the right at all or to be bound by provisions in such regulatory statute which deny equal protection of the laws or take property without due process of law? The question was answered by this Court in the language of Mr. Justice Sutherland in Frost Trucking Co. v. R. R. Com., *supra,* at page 593:

> "If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion."

May a State lawfully say to a citizen that if he wishes to exercise his constitutional right to acquire property he may do so provided he consents that when so acquired it may be taken from him without due process?

In the exercise of the police power, the subject of many occupations may be licensed and regulated by the State, but may the State lawfully provide that any person so licensed to follow a given occupation shall have no right to sue in any court in respect of any claim or matter arising out of such occupation, and that all such claims shall be determined by arbitration, with or without notice? And may it be urged in such case that the person, by obtaining a license and acting under such statute, thereby waives his constitutional rights and consents that he may be so denied the equal protection of the laws or that his property may be taken from him without due process?

And so it is with one who desires to purchase property,

the title to which may be registered under the Torrens system, or any other system for that matter. Must such person either forego his constitutional right to acquire the property if the owner is willing and able to sell it, or be compelled in case he does so acquire it to waive other constitutional guaranties? If so, then a new method has been discovered by which a State may (as Mr. Justice Sutherland pointed out in the excerpt last quoted) indirectly destroy all constitutional guaranties by means of the "consent route," by compelling a person to waive one constitutional privilege in order to exercise another. By such means, statutes which regulate or concern the subject of contracts, conveyancing, occupations, common pursuits, and the like, may not be held invalid regardless of how and to what extent they may impair or take away constitutional guaranties, because of the theory announced in the opinion of the court below and applied in this case that one who voluntarily acts or proceeds under such a statute will be held to have consented to be bound by all of its terms and thereby shall be deemed to have waived the right to urge the unconstitutionality of any of its provisions, which waiver or consent is contained either expressly or impliedly in the statute itself. If this doctrine is to prevail, then, as has been often said by this Court, there is no limit to the power of the State to take away and impair the rights secured by the Fourteenth Amendment.

It is no answer to say that a person is not required to purchase property registered under the Torrens system. It is possible, though not probable, that all lands may become registered under that system; but whether so or not, a person has as much right under the federal Constitution to acquire property registered under that system as any other property. His right to acquire and own prop-

erty may not be determined by the circumstances under which title to the property is evidenced.

As said by Mr. Justice White in Pullman Co. v. Kansas, 216 U. S. 56, p. 70, "The controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly." And, as said by this Court in the *Frost case, supra,* at page 594, "If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

We have shown by the decisions of this Court that the State cannot exact as the price for the exercise of a mere privilege, which the State may grant or withhold at pleasure, the waiver of a right or immunity guaranteed by the Fourteenth Amendment. If the State may not do this in respect of a privilege which it may deny altogether, there is a much weightier reason why it cannot do so in respect to the exercise of a right or privilege guaranteed by the federal Constitution.

POINT D.

CASES HOLDING THAT A PERSON MAY WAIVE A CONSTITUTIONAL RIGHT OR ESTOP HIMSELF FROM ASSERTING IT, DISTINGUISHED.

In the reply brief filed by the registrar to Appellants' Statement as to Jurisdiction on Appeal a number of cases are cited in support of the general proposition that a person may under given circumstances waive a constitutional right or estop himself from asserting it. We submit that these authorities are not applicable here, and are not at all inconsistent with the principle announced by this Court and applied in the numerous cases we have cited above.

The cases relied on by appellees fall into two classes: the first, those where a party has himself invoked the jurisdiction of a court or other constituted authority pursuant to the provisions of a statute and has obtained the exercise of such jurisdiction, and, being dissatisfied with the result, has sought to escape from it by asserting the invalidity of the statute authorizing such proceeding. The second class consists of those cases governed by the general equitable principles of estoppel *in pais*. Both classes, however, are limited in application to a waiver by the party of such right or an estoppel arising against him to assert it in a present specific instance and not, as said by this Court in Insurance Co. v. Morse, 87 U. S. 445, 451: "to forfeit his rights at all times and on all occasions, whenever the case may be presented."

The instant case could fall into one or the other of these classes only under circumstances such as the following: the first, if appellants had been allowed a hearing on the merits upon the issues raised by their petition and being dissatisfied with the decision in such proceeding, had then sought to escape the results of their own action by asserting the nullity of the decree because the provisions of the statute authorizing such proceeding were unconstitutional; or, the second, if appellants had received any part of the consideration paid by appellees for the purchase of the property, or had stood silently by, knowing the facts, without asserting their rights and had permitted appellees to complete the purchase and pay out their money, or had been guilty of any other act or omission upon which appellees relied to their prejudice, which conduct would have made it unjust and inequitable to permit appellants to obtain the relief sought by their petition. In the instant case, however, no such supposed facts in truth exist.

A person may voluntarily agree in a specific concrete

case to waive a constitutional right in respect to that particular case, as where a corporation agrees not to remove a certain case to a federal court or agrees to pay a certain unconstitutional tax; but, as held by this Court in the cases we have cited above, no such agreement or consent can be compelled or imposed by a state statute, or implied from the acts of such corporation proceeding under or in obedience thereto; nor can such corporation be held to have consented not to remove a case to a federal court or to pay an unconstitutional tax simply because it has come into the state and availed itself of the privileges granted by the statute; nor is a general waiver of a constitutional right, applicable at all times and on all occasions, valid and enforceable.

As this Court said in Insurance Co. v. Morse, 87 U. S. 445, at page 451:

> "A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's* Case, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. *He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.*" (Italics ours.)

The distinction between the cases relied upon by appellees and the instant case is readily apparent. In those cases the waiver was purely voluntary—not, as in the instant case, in the *removal* and *tax cases* and in the *Frost Trucking Co. case* (271 U. S. 583, 592, 599) coerced by the

State by compelling a person to elect, either not to exercise the right or privilege granted by the statute at all, or, as the price of exercising such right or privilege, to waive the protection of constitutional guaranties. Moreover, in those cases the waiver which was given effect related only to some present, particular, concrete matter and was not a waiver which by the Court's decision was made applicable at all times and under all circumstances whenever occasion might arise. Such cases therefore in no manner support the conclusion reached by the court below in respect to the supposed waiver alleged to be contained in the statute in the instant case.

We believe it will be plain to this Court that the principle and rule established in the *removal* and *tax cases* and in the *Frost case* and in *Power Co.* v. *Saunders* above cited—and not the one applied in the cases relied upon by appellee—control the decision of the case at bar.

POINT E.

THE STATUTE IMPLIES NO CONSENT THAT A CERTIFICATE OF TITLE BASED UPON A FORGED DEED SHALL BE CONCLUSIVE IN FAVOR OF A PURCHASER.

The court below held that by Section 46 of the statute a transferee of a registered title consents that any certificate issued by the registrar, even though based upon a forged deed, shall be conclusive against the former owner in favor of a subsequent purchaser, and that the transferee thus waives his right to complain that the Act, as construed and applied by the court below, is unconstitutional. We have shown, we think, that such consent, even if given, is invalid and not binding upon these appellants.

We wish here to urge that under a proper construction of the Illinois Torrens Act, a transferee of a registered

title does not in fact consent that a certificate of title based upon a forged deed shall be conclusive in favor of a purchaser, and, further, that while the construction of the statute holding such certificate conclusive is binding on this Court when considering the question as to whether the statute as construed and applied by the state court deprives appellants of their property without due process of law, this Court is not bound by the construction of the statute by the state court when considering the question as to whether appellants have consented to the statute in such manner that they are estopped or have waived their right to complain against the statute as depriving them of their property without due process of law.

(a)

In this case, when considering the question of whether appellants have consented to be bound by all the terms of the Torrens Act and therefore have waived their right to complain that the statute deprives them of their property without due process of law, this Court is not bound by the state court's construction of the statute, but must decide for itself the true construction of the statute.

In the instant case, if, in fact, by the terms of the Act appellants as transferees of the title have been compelled to agree that *any* certificate of title issued by the registrar, even though based on a forged deed, shall be conclusive in favor of a purchaser, then such agreement must be found in the terms and provisions of the statute.

The contention that appellants have waived their right to complain or are estopped against complaining of the provisions of sections 40 and 42 of the Act, is based upon the assumption that such an agreement is found in the terms and provisions of the statute. If the existence of such

agreement is to be made the test by which the validity of the statute must be determined, we respectfully submit that it is the duty of this Court, following the rules laid down in the cases mentioned below, to ascertain for itself whether under the provisions of the statute any such agreement was in fact made in behalf of these appellants as transferees of the title.

Where a question is raised whether a state has violated the constitutional provision prohibiting the impairment of the obligation of contracts, this court will determine for itself the existence, construction and validity of the alleged contract even if this involves the construction of statutes. (N. Y. Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 186; Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8.) If this power did not exist in this Court, then such unconstitutional provision could always be evaded by the state courts giving such construction to a contract or such decisions in respect to its validity as to render the powers of this Court of no avail. (Delmas v. Insurance Co., 81 U. S. 661, 668; Bridge Proprietors v. Hoboken Co., 68 U. S. 116, 145.)

This same rule has been applied by this Court in other cases where the federal right set up in the state court has been wrongly denied and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost.

Truax v. Corrigan, 257 U. S. 312.

Scott v. McNeal, 154 U. S. 34.

Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8.

In Truax v. Corrigan (257 U. S. 312) Mr. Chief Justice Taft, speaking for the Court, at page 324, said:

"The facts alleged are admitted by the demurrer, and in determining their legal effect as a deprivation

of plaintiff's legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. Mackay v. Dillon, 4 How. 421; Dower v. Richards, 151 U. S. 658, 667. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. Bailey v. Alabama, 219 U. S. 219, 238-239; Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418; Mugler v. Kansas, 123 U. S. 623, 661; Corn Products Refining Co. v. Eddy, 249 U. S. 427, 432. In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact *or has been waived or lost,* this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591, 593; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668, 669; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611. * * * In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard." (Italics ours.)

In Scott v. McNeal, 154 U. S. 34, letters of administration had been issued by the Probate Court of Thurston County, Washington, on the estate of a man in fact alive, but presumed to be dead by reason of his long absence. The administrator was authorized to, and did, sell certain real estate belonging to the supposed decedent. Afterward the latter appeared alive and instituted suit to recover his

property. The state court construed the statute and held that the judgment of the Probate Court was not void and that the supposed decedent had not been deprived of his property without due process of law. In reviewing this judgment, this Court, in defining the scope of its powers to review the decision of the state court, at page 45 said:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. *In every such case, this court must decide for itself the true construction of the statute.*. Huntington v. Attrill, 146 U. S. 657, 683, 684; Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486, 492-495." (Italics ours.)

(b)

The Illinois Torrens Act when correctly construed does not imply an agreement on the part of a registered owner that a certificate of title based upon a forged deed shall be conclusive in favor of a purchaser.

The supposed agreement or consent on the part of a registered owner, upon which the court below bases its decision, that *any* certificate of title issued by the registrar shall be conclusive in favor of a purshaser, is to be found, if at all, in Section 46 of the Act. (*ante* p. 7.) While other parts of the act aid in determining the true meaning of Section 46, no other provision of the Act specifically deals with the question of consent.

That section provides that "the bringing of land under this act shall imply an agreement, which shall run with the land *that the same shall be subject to the terms of the act and all amendments and alterations thereof* * * *."

The agreement contained in Section 46 is clearly intended to bind a subsequent transferee, not by the terms of any *one* section construed separate and apart from the others, but *by all the terms* of the Act construed together.

Section 42 (*ante*, p. 7) particularly deals with the protection of purchasers of registered titles. Its essential parts are as follows:

> "Except in case of fraud and *except as herein otherwise provided*, no person taking a transfer of registered land * * * from the registered owner shall be held to inquire into the circumstances under which, or the consideration for which such owner or any previous registered owner was registered, or be affected with notice actual or constructive, of any unregistered trust, lien, claim, demand or interest."

That is, the agreement said to be implied in Section 46 is not that *any* certificate of title issued by the registrar under any circumstances shall be absolutely conclusive in favor of a purchaser, as the court below held, but a qualification and exception to the conclusiveness of the certificate is plainly stated in Section 42. The certificate is to be conclusive "except in case of fraud *and except as herein otherwise provided.*"

In construing Sections 40, 42 and 46, and in reaching the conclusion that by the terms of the Act a transferee has consented that the registrar's certificate in all cases shall be conclusive in favor of a purchaser, the court below failed to notice this exception contained in Section 42 and also overlooked and failed to give any effect to Sections 47 and 54 of the Act.

Sections 47 and 54 (*ante*, p. 8) prescribe the con-

ditions under which the registrar is empowered to register transfers and to issue new certificates of title. Unless these conditions exist, the registrar is without power to act, and any attempted action taken by him is without authority of law, contrary to the statute and a nullity. His unauthorized act, like a judgment of a court entered without jurisdiction, is wholly void. (People v. C. & N. W. Ry. Co., 270 Ill. 232.)

Sections 47 provides (italics ours):

> "A *registered owner* of land desiring to transfer his * * * interest therein * * * *may execute* to the intended transferee *a deed or instrument of conveyance* * * *. And, upon filing *such* deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title * * * he shall make out and register * * * a new certificate * * *."

Section 54 provides that a deed of registered land

> "shall take effect only by way of contract between the parties thereto, and *as authority to the registrar to register the transfer* * * * *upon compliance with the terms of this Act.* On the completion of such registration, the land * * * shall become transferred * * * according to the purport and terms *of the deed* * * *."

The Act thus requires two things to concur *before* the registrar acquires jurisdiction—power to act at all—viz., delivery of the owner's genuine deed and his duplicate certificate of title. The provisions of the Act are comparable to various statutes requiring several things to be done before a court may lawfully act, such as posting *and* mailing of notices, publication *and* mailing notices, filing bond *and* certified copy of order of appointment, filing of petition *and* service of notice, etc. The omission of one of the two requirements defeats the jurisdiction even of courts of general jurisdiction, and it can hardly be contended that

a similar rule will not be applied to the jurisdiction of a mere ministerial officer.

The registrar is a non-judicial officer vested with limited powers. They are those, and only those, granted by the statute. They cannot be extended by presumption or implication, *as might be the case with a court of general jurisdiction.* The very existence of any power in the registrar to register transfers and to issue new certificates depends, by the terms of the statute itself, upon the execution *by the registered owner* of a deed and the presentation of *that* deed—not a void writing executed by a stranger—to him. In other words, the Act protects the owner against theft of his title by forgery, and *in terms makes the genuine deed of the registered owner the only authority to the registrar to register any transfer.* Thus the Act itself furnishes no more authority to the registrar to act upon the presentation of a forged deed than upon the presentation of a mere blank sheet of paper—or, indeed, of nothing at all.

In Chicago Railways Co. v. Commerce Commission, 336 Ill. 51, the Supreme Court of Illinois, in holding void a certificate of convenience and necessity issued by the State Commerce Commission under conditions which did not conform to the provisions of the statute creating the Commission and defining its powers, at page 70 said:

> "The Commission is created by Statute and has no powers except such as are conferred by the act creating it. It cannot change any condition fixed by the legislature."

We submit therefore that a certificate of title issued by the registrar, based upon a forged deed, is absolutely void.

By executing a deed and delivering it to the registrar (together with his duplicate certificate) the registered owner thereby enters his appearance in the matter of the transfer of title, has notice of the entire proceeding and

an opportunity to protect his rights. But when the transfer is made and a new certificate is issued based upon a *forged* deed, the true owner has no notice of the transaction and no opportunity to be heard. No provision for notice is contained in the Act. By Section 42, the purchaser is told that he may rely upon the certificate of the registrar "except in case of fraud and *except as herein otherwise provided.*" The purchaser is thus given a clear warning, that before relying upon the certificate, he must read the other terms and provisions of the Act and ascertain therefrom the meaning of the exception contained in Section 42.

Upon reading Sections 47 and 54 the purchaser is informed that the registrar is authorized to make a transfer of the title and to issue a new certificate of title *only* when a *genuine* deed of the owner is presented to him, and that without such genuine deed the registrar is not authorized to act and that, therefore, any certificate issued by him evidencing a supposed transfer of title without the authority of a genuine deed is void. Thus, while a purchaser is not to be affected by "any *unregistered* trust, lien, claim, demand or interest" (Section 42) or even obliged to see that the consideration for any previous transfer has been paid (the prior owner having presented *his* deed to the registrar and authorized the registrar to act, is required to protect his rights in all such matters) the intending purchaser is required before acting upon a certificate of title to ascertain that such certificate was issued by the registrar in conformity with the Act; *i. e.*, based upon the authority of a genuine deed executed by the former owner. The registered owner cannot under any theory be said to have agreed that *any* registration of transfer or issuance of a new certificate affecting his title which the registrar may make without authority of the statute, based upon a *forged* deed or upon no deed at all, in *contravention* of Sections 47

and 54, shall have the effect prescribed by Sections 40 and 42. *It is only such records and such transfers as are made pursuant to and under the authority of Sections 47 and 54 that are entitled to effect as evidence of title prescribed by Sections 40 and 42;* and it is to such *lawful* records and certificates, and *only* to them, that the owner can be said to have agreed to be bound.

This Court said in Scott v. McNeal, 154 U. S. 34, at page 46:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court or without notice to the party."

It must necessarily follow that no act of a ministerial officer is valid, if performed without authority and without notice to the party to be adversely affected.

In ascertaining the true meaning of these sections of the Torrens act, and the true extent of the transferee's consent, the matter of notice in respect to any transfer which may be made by the registrar under the provisions of the Act is therefore important and controlling.

Possibly a statute may provide that when an owner of registered property presents to the registrar his genuine deed and duplicate certificate, the registrar may transfer the title and issue a new certificate to the transferee (Sections 47 and 54) and that such certificate shall have the conclusive effect stated in Sections 40 and 42. In such case the registrar by reason of the presentation to him of the genuine deed of the owner and his certificate acquires jurisdiction of both the subject matter and the person of the owner and therefore the result stated in Sections 40 and 42 in respect to the conclusiveness of the new certificate may follow.

But when the registrar acts under a forged deed, both

elements of jurisdiction are wanting. The registrar does not acquire jurisdiction of the subject matter, because authority to act in respect to a transfer is only conferred upon him when a genuine deed of the owner is presented to him (Sects. 47 and 54). The registrar does not acquire jurisdiction over the person of the owner because no notice is given to such owner, and the owner does not enter his appearance in the matter of the transfer, as he does when he presents his own deed to the registrar and requests the transfer to be made.

If then, the court, in construing the Torrens Act, is to yield to the contention that a transferee by the terms of the Act has agreed that he may be deprived of his property by means of a forged deed and without notice, specific authority to that effect must be found in the Act itself. If it be said that there is an implied agreement on the part of the transferee that his lands "shall be subject to the terms of the act and all amendments and alterations thereof," it would be no warrant for holding that the transferee has consented that the specific provisions of Sections 47 and 54, which alone confer upon the registrar power to transfer a title, may be wholly disregarded and that he, the owner, may be deprived of his property by means of a forged deed and without notice in order that Sections 40 and 42 may give to a *void* certificate of title an effect which is inconsistent with the spirit and with the manifest provisions of the act when construed as a whole.

We respectfully submit that when the statute is correctly construed, it will be found that a transferee of a registered title has not agreed by the terms of the Act that his title may be taken from him by means of a forged deed or that a certificate of title issued by the registrar based upon a forged deed shall be conclusive in favor of a purchaser.

POINT F.

THE HOLDING OF THE COURT BELOW THAT APPELLANTS, UNDER THE PROVISIONS OF THE ACT, HAD WAIVED A CONSTITUTIONAL RIGHT, DOES NOT OUST THIS COURT OF JURISDICTION.

The registrar contends (p. 24 of his petition to appear, etc.) that the court below having decided that appellants, by force of the statute, had consented to be bound by all its provisions and thus had waived their constitutional right here involved, no federal question is presented on this appeal. He cites but two cases in support of his contention, viz., Pierce v. Somerset Ry., 171 U. S. 641, and Eustis v. Bolles, 150 U. S. 361.

Neither of these cases, we contend, is in point. Both cases involved an estoppel *in pais;* in the *Pierce case* (p. 648) based upon laches and acquiescence—in the *Eustis case* (p. 368) upon acceptance of money paid pursuant to the award subsequently assailed. Furthermore, both of these cases involved a waiver only in a specific pending matter, and not a general waiver in all cases and under all circumstances, which the court below in the instant case held was imposed by the Torrens statute.

Moreover, this Court, speaking upon this subject in a later decision (Truax v. Corrigan, 257 U. S. 312, 324) in an opinion by Mr. Chief Justice Taft, said:

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact *or has been waived or lost,* this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. *If the rule*

were otherwise, it almost always would be within the power of a state court practically to prevent a review here. Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591, 593; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668, 669; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611." (Italics ours.)

The right of this Court to review the decision below and to pass upon the federal question concerning the validity of the statute is governed, we submit, by the rule announced and applied by this Court in the numerous *removal* and *tax cases* above cited by us. In all of those cases this court took jurisdiction, notwithstanding that all of them, with two exceptions, were reviewed on writ of error from state courts in which the validity of the statute had been sustained by the state courts upon the ground, among others, that the complaining corporation had, by voluntarily availing itself of the privileges granted by the statute—in some instances having agreed in writing pursuant to the terms thereof not to remove any case to the federal court—waived the right to assail the constitutionality of such statute.

POINT G.

THE ONLY GROUND ON WHICH RESTS THE DECISION BELOW IS THE CONSTITUTIONAL VALIDITY OF THE STATUTE.

While, as we have pointed out (*ante*, p. 21), the court below was in error in supposing that it was within the power of appellants under this statute to prevent this fraud by retaining possession of their duplicate certificate of title, nevertheless that court did not base its decision, independent of the statute, upon any equitable ground or principle of general or local law that appellants should lose their title because of any negligence or other act on their part in suffering their duplicate certificate to get out of their possession. The opinion contains no intimation that, independent of the provisions of Sections 40 and 42 (which sections as construed made the certificate issued to Napletone conclusive evidence of title in favor of appellees), the court would have decided adversely to appellants because they suffered Napletone to obtain possession of the duplicate certificate. To the contrary the opinion expressly states (R. 22) that the Wilborns "took a good title *unless the statute is unconstitutional.*" Therefore, the only ground on which rests the decision below is the constitutional validity of the statute as construed and applied in this case.

CONCLUSION.

This case is one in which there is drawn in question the validity of a statute of Illinois as construed and applied by the Supreme Court of that State, on the ground that it is repugnant to the Fourteenth Amendment of the federal Constitution, and we respectfully submit that the federal question involved is a substantial one and that this court has jurisdiction of this appeal.

We respectfully submit, further, that under the well settled principles of law announced by this Court in the cases hereinabove cited, it is manifest that the statute complained of, as construed and applied to appellants by the court below, is obnoxious to the Fourteenth Amendment because it deprives them of their property without due process of law, and that it cannot be sustained upon the grounds assigned by the court below.

It follows, therefore, that the judgment below is erroneous and should be reversed.

Respectfully submitted,

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